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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

First Named Applicant: Butterworth	)	Art Unit: 2444
	)	
Serial No.: 10/090,404	)	Examiner: Cloud
	)	
Filed: March 4, 2002	)	ARC920010105US1
	)	
For: <b>SYSTEM AND METHOD FOR</b>	)	December 1, 2011
<b>DETERMINING WEAK MEMBERSHIP IN</b>	)	750 B STREET, Suite 3120
<b>SET OF COMPUTER NODES</b>	)	San Diego, CA 92101
	)	

REPLY BRIEF

Commissioner of Patents and Trademarks

Dear Sir:

This Reply brief responds to the Examiner's Answer dated November 28, 2011. Having been fully reversed by the Board in a previous appeal in this case, it is clear that the examiner has no compunction over a second correction. Accordingly, herewith:

On page 8 the Answer begins its response to Appellant's point that unlike Claim 1, in which each node computes an optimum nodal membership *that converges* with those of other nodes *without having to transmit optimization solutions to the other nodes*, in Elliot either master node computes the schedule and disseminates it or the individual nodes compute their own schedules and then share them with other nodes. The examiner appears to concede this point because argument (A) does nothing more than weakly observe that the individual nodes do not have to share their schedules with the other nodes. This utterly fails to account for the bolded italicized subject matter above, namely, that nothing in the relied-upon portions of Elliot teach that the schedules computed by the individual

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nodes converge with each other without the act of sharing being undertaken. Since to anticipate, each and every claim element must be shown to be explicit or inherent in the prior art, the rejections fail as a matter of clear legal error; “[a]nticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim,” *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983). The requirement that the prior art elements themselves be “arranged as in the claim” means that claims cannot be “treated . . . as mere catalogs of separate parts, in disregard of the part-to-part relationships set forth in the claims and that give the claims their meaning,” *Lindemann Maschinenfabrik GMBH v. Am. Hoist & Derrick Co.*, 730 F.2d 1452, 1459 (Fed. Cir. 1984). “[U]nless a reference discloses within the four corners of the document not only all of the limitations claimed but also all of the limitations *arranged or combined in the same way as recited in the claim*, it cannot be said to prove prior invention of the thing claimed and, thus, cannot anticipate under 35 U.S.C. § 102,” *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008) (emphasis added).

Appellant notes that the case for reversal is bolstered by Elliott at col. 9, lines 33-41, which first discuss that the schedules may be "harmonized" using "current collision set member schedules". This plainly implies that to "harmonize" those schedules, they first must be shared, contrary to Claim 1. Elliott goes on to explain that independent schedule computations may be "synchronized" - conspicuously different from "harmonized" - by having the nodes compute their schedules at given times, such that different schedules can be activated at predetermined times throughout the network.

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In this latter "synchronization" case it appears that the schedules are not "harmonized" in a way that would reach the "converging" requirement of Claim 1, but merely "synchronized" by activating independent, *different* schedules at set times so as to avoid conflict between different schedules being simultaneously activated. In any case, Claim 1 is not taught in the relied-upon portions of Elliott in any cognizable way.

The conferees fail to address Appellant's point that Elliott does not teach a common seed (e.g., Claim 2), conceding it.

The conferees fail to address Appellant's point that Elliott does not teach modules (e.g., Claims 4-6), conceding it.

With respect to Appellant's point *apropos* Claim 9 that Elliott does not make a determination that the most desirable solution is fully connected, much less the logic branches from that determination required by Claim 9, the examiner alleges that the claim does not state *what* is fully connected and how determines what is "most desirable". The first allegation is factually erroneous on its face - Claim 9 requires that the most desirable solution be fully connected. The second allegation is irrelevant to an anticipation rejection, sounding more in written description terms with which in any case Appellant does not agree. Regardless, nowhere is the examiner able to conjure any teaching or suggestion from Elliott that would approach a determination of *anything* being fully connected no matter how broadly, erroneously or otherwise, the examiner cares to read the claim.

Furthermore, it is axiomatic that claims must be interpreted as one skilled in the art would

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interpret them, *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*) and *In re Morris*, 127 F.3d 1048 (Fed. Cir. 1997). The conferees have apparently ignored this legal requirement in making the above-discussed allegations on page 9 of the Answer, indicating reversal is appropriate. For instance, the second paragraph of page 10 of the present discusses what is meant by "optimum" solution, which plainly is linked to a claim recitation of the "most desirable" solution. This is bolstered by the last five lines of page 12 continuing to page 13. The conferees must have ignored the legal requirements of *Phillips* to make the allegations they did, indicating reversal is appropriate.

Indeed, this clear error is amply demonstrated on page 9 of the Answer, equating Elliott's "desired solution" as that being defined by the fewest collisions to Appellant's optimum solution requiring maximal membership.

Appellant notes that the summary rejection of Claim 10 has not been cured on page 7 of the Answer nor in the rebuttal of Appellant's Brief on pages 9 and 10 of the Answer, indicating concession that a proper *prima facie* case of obviousness has not been established for Claim 10. Note that Claim 10 recites subject matter not recited in Claims 1-9. This clear legal error is easily reversed, because no rejection of Claim 10 appears on the record other than the clearly erroneous allegation that it is like Claims 1-9.

The rebuttal to Appellant's arguments related to Claim 33 is perhaps weakest of all. All the conferees can do is castigate Appellant for not defining "view" on the face of the claim, oblivious to the host of other untaught features in Claim 33 and with particular respect to the term "view" oblivious

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From:rogitz & associates

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to the requirements of *Phillips, supra.* Reversal is richly merited. Again.

Respectfully submitted,

/John L. Rogitz/

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